Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1996

EDWARD R. BARRON,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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28 pgs

QUESTIONS PRESENTED

1. Whether the District Court entered an illegal Order of Restitution in violation of 18 U.S.C. § 3663 and The Fifth Amendment of the Constitution.

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PRAYER

The Petitioner, Edward R. Barron, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on May 21, 1996.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of conviction and sentence in this case was not published and is attached as Appendix A.

JURISDICTION

This Court has jurisdiction of this action under Title 28, United States Code, Section 1254(1), providing in pertinent part that cases in the courts of appeal may be reviewed by the Supreme Court by writ of *certiorari*. This petition is timely filed since petitioner's motion for rehearing was denied on June 21, 1996, 87 F.3d 1313. The United States Solicitor General has been served with this petition in accordance with Rule 29.4(b).

CONSTITUTIONAL PROVISION AND STATUTES

Amendment V. United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 657 provides, in pertinent part, as follows:

> Whoever, being an officer, agent or employee of or connected in any capacity with the Federal Deposit Insurance Corporation, National Credit Union Administration, Office of Thrift Supervision, the Resolution Trust Corporation, any Federal home loan bank, the Federal Housing Finance Board . . . or any lending, mortgage, insurance, credit or savings and loan corporation or association . . . embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall

be fined not more than $1,000,000 or imprisoned not more than 30 years, or both . . . .

18 U.S.C. § 3663 states, in pertinent part:

(a)(1) The court, when sentencing a defendant convicted of an offense under this title . . . , may order, . . . , that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned[.]

FED. R. CRIM. P. 35 (as applicable to crimes committed prior to November 1, 1987)

(a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence.

(b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment . . . .

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in the Courts Below.

On September 10, 1993, Barron entered a plea of guilty to a one count Criminal Information charging him with aiding and abetting the misapplication of moneys, funds and credits of

a federally insured savings association in violation of 18 U.S.C. § 657 and § 2. On April 7, 1994, Barron was sentenced to a term of three (3) years imprisonment under 18 U.S.C. §4205(a), a fine of $10,000 and restitution in the amount of $2,000,000 with joint and several liability with a co-defendant, Rupert Hays.

Barron filed a Motion for Modification of Sentence on August 3, 1994, pursuant to the pre-1987 version of FED. R. CRIM. P. 35(b).[1] This motion requested the trial court to reconsider the length of defendant's sentence, in light of his substantial assistance to the government and the sentence of similarly situated defendants, and the amount of the restitution order, in light of his minimal personal benefit and repayment of the underlying loan. The motion was partially granted on October 4, 1994, reducing Barron's sentence to eighteen (18) months and the restitution to $1,000,000.

On June 2, 1995, Barron filed a Motion for Correction and Modification of Sentence under former Rule 35(a), maintaining that the $1,000,000 restitution order was illegal.[2] The District Court denied the motion on July 25, 1995 and later

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[1]A motion to reduce sentence under former Rule 35(b) is addressed to the discretion of the trial judge and will be reversed only for illegality or gross abuse of discretion. *United States v. Lacey*, 661 F.2d 1021, 1022 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2036.

[2]Challenges to the legality of restitution orders may be brought under the provisions of Rule 35(a) at any time. *United States v. Guardino*, 972 F.2d 682, 685 (6th Cir. 1992); *United States v. Kress*, 944 F.2d 155, 158 (3rd Cir. 1991), *cert. denied*, 112 S.Ct. 1163 (1992).

denied Barron's Motion for Reconsideration and Request for Findings of Fact.

The Fifth Circuit Court of Appeals affirmed the District Court's decision in a per curiam decision filed May 21, 1996 and denied Barron's Motion for Rehearing on June 21, 1996.

2. Statement of Facts

a. Overview

Barron was employed as president of Victoria Savings and Loan (VSA) for a period of approximately two and a half years beginning in January 1987. At the time of his employment, the institution had entered into and was governed by various supervisory agreements; Barron was hired to provide professional management and assist VSA in restructuring its real estate loan portfolio.

The financial failure of VSA resulted in the criminal prosecution of numerous individuals. However, except for the act to which Barron pleaded guilty, he was not alleged to have been criminally involved in any of the transactions outlined in an extensive indictment relating to VSA's officers and borrowers. In fact, most of the criminal conduct occurred prior to his employment. Barron was the first defendant to enter into a plea agreement and fully cooperated with the government in their efforts to investigate VSA.

b. Count of Conviction

The count of conviction relates to a transaction involving VSA and Bankers' Thrift. In August 1987, VSA, through its wholly owned subsidiary, South Coast Mortgage Company, acquired MVIC for a total investment of

$11,170,065.01. As part of this transaction, it was agreed that MVIC would invest $2,000,000 of these funds in its subsidiary Bankers' Thrift. Bankers' Thrift was simultaneously sold to a nonaffiliated entity and a note for the purchase price was entered on the books of MVIC. In VSA's accounting of the acquisition of MVIC, this note was discounted by independent auditors due to its low interest rate and term of maturity. In February 1989, VSA received a payment in an amount equal to the discounted value of the note. The books and records of VSA do not show any loss relating to this transaction. See, Appellant's Reply Brief.

The $2,000,000, which the government characterized as an "overfunding," was subsequently utilized for the benefit of VSA's majority shareholder, Rupert Hays. However, in pleading to charges of aiding and abetting the misapplication of funds, Barron did not concede that there had been any loss resulting from this conduct. The Factual Summary of the Plea Bargain Agreement merely stated that Barron "knew that at least $70,010 in funds" was fraudulently used for the personal benefit of Rupert Hays. The "Factual Summary" of the plea agreement described only one transaction dealing with misapplication of funds, as follows:

> On or about September 22, 1987, approximately $70,010.00 in funds was wired from the San Pedro Bank BTLA account to an account at another San Antonio bank, to the ultimate benefit of DEFENDANT RUPERT HAYS.
>
> By this point in time Edward R. Barron knew that at least $70,010.00 in funds out of the original $2,000,000 would fraudulently go to personally benefit of Rupert Hays.

Moreover, the government proffered in court testimony that Barron was only being charged with aiding the misapplication of the first $70,000 of the $2,000,000 that was ultimately misapplied by Hays.[3]

c. The Restitution Order

In preparing the presentence investigation report (PSR) the probation officer took the position that "as a result of Mr. Barron's fraudulent activities at VSA regarding this case, the bank has incurred a loss . . . for a total of $25,602,214." (PSR at page 5). At sentencing, in response to numerous objections by the defendant, the government abandoned this untenable position and stated "let me make it clear that we're only asking for two million dollars restitution." (Sentencing Transcript at page 15). The government failed to present any evidence or prove that any loss was caused by Barron's conduct. The original restitution order was entered without a finding with respect to the amount of loss.

In response to Barron's appeal to the discretion and leniency of the sentencing court, the restitution order was

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[3]*See, United States v. Chad Powell, et al*, SA-93-CR-62, Trial Transcript Vol. XVII, pg. 237 attached to Defendant's Motion for Reconsideration. In that trial the prosecution proffered the following testimony:

> Q: (by prosecutor) In fact, you are only charged with aiding in the misapplication of the first $70,000 of that $2 million I mentioned, is that correct?
>
> A: (by Mr. Barron) That is true.

reduced to $1,000,000. However, again, the record is devoid of any findings or evidence supporting this decision.

REASONS FOR GRANTING THE WRIT

Issue No. 1: Whether the District Court entered an illegal Order of Restitution in violation of 18 U.S.C. § 3663 and The Fifth Amendment of the Constitution.

The restitution order in this case violates statutory requirements and is in conflict with case law from the Fifth Circuit, other circuits and decisions of this Court. Specifically, the restitution order violates the mandate of *Hughey v. United States*, 110 S.Ct. 1979 (1990) and this case should be summarily remanded to the Court of Appeals for consideration consistent with that decision.

1. Statutory Requirement for Restitution Orders

"Federal courts do not have the inherent power to order restitution. The power to order restitution must, therefore, stem from some statutory source." *United States v. DeSalvo*, 41 F.3d 505, 511 (9th Cir. 1994). Restitution orders are governed by the provisions of 18 U.S.C. § 3663, *et. seq.*[4]

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[4]The Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. §§ 3579, 3580 (recodified now as 18 U.S.C. § 3663, and 18 U.S.C. § 3664) authorizes federal courts to order a defendant to make restitution to a victim of the offense of conviction. See *Hughey v. United States*, 110 S.Ct. 1979 (1990).

a. A restitution award is not authorized except for the actual loss caused by the specific conduct that is the basis of the offense of conviction.

This Court has ruled that the plain language of the Victim and Witness Protection Act (VWPA) makes clear that a restitution order is limited to the amount of loss directly related to the count of conviction. *Hughey v. United States*, 110 S.Ct. 1979 (1990). More specifically, restitution is limited to the loss caused by the specific conduct that is the basis of the offense of conviction. *Id.* at 1984; *United States v. Chaney*, 964 F.2d 437, 452 (5th Cir. 1992).

In *United States v. Hayes*, 32 F.3d 171 (5th Cir. 1994), the defendant was convicted of three counts of possessing stolen credit cards. Although the defendant's use of the credit cards resulted in a loss, the actual possession of the cards, the count of conviction, could not serve as a basis for a restitution order. *Hayes*, 32 F.3d at 173. Similarly, in *Hughey*, this Court held that when the count of conviction involved the unauthorized use of only one credit card, a restitution order including losses resulting from the use of other credit cards was not authorized under the statute.[5] *Hughey*, 110 S.Ct. at 1986.

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[5]It should be noted that, §3663(a)(2) which provides "For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern" was not part of the version of the VWPA applicable in this case. [See, Pub. L. 101-647 § 2509(2)]; *United States v. Stouffer*, 986 F.2d 916, 928 n. 19 (5th Cir. 1993). When the criminal conduct predates the 1990 amendment, restitution is strictly limited to the losses resulting from the count of conviction. *United States v. Newman*, 49 F.3d 1, 11 (1st Cir. 1995); *United States v. DeSalvo*,

Actual loss is not a requisite element of a conviction for aiding and abetting the misapplication of funds under 18 U.S.C. § 657. *United States v. Tullos*, 868 F.2d 689 (5th Cir. 1989), *cert. denied*, 109 S.Ct. 3171.[6] Nor is actual loss presumed by a count of misapplication of funds. *See, e.g. United States v. Davis*, 953 F.2d 1482, 1492-93, (10th Cir. 1992); *United States v. Levy*, 741 F.2d 915 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 440 (1985); *United States v. Morgan*, 845 F.Supp. 934 (C. Conn. 1994) (An individual may be guilty of misapplication if his conduct subjects the institution to some risk of pecuniary loss, regardless of whether such loss actually occurs.)

In the instant case, Barron pleaded guilty to aiding and abetting another individual's misuse of funds belonging to the savings and loan association. As in *Hayes* and *Hughey*, no loss can be attributed to this conduct and a restitution order based upon an unrelated loss is illegal.

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41 F.3d 505, 514-515, (9th Cir. 1994); *United States v. Elliott*, 62 F.3d 1304, 1314 (11th Cir. 1995).

[6]In protracted and all-encompassing civil litigation, the FDIC and RTC (the "victims") have failed to claim that they suffered any loss as a result of the activities described in the count of conviction. See, *RTC v. Rupert Hays, et al*, Cause No. SA-92-CA-0653 (the D&O Action"). Said cause is currently pending in the United States District Court for the Western District of Texas. Despite numerous amendments to the pleadings, the government has failed to allege that Hays' misapplication of funds on the MVIC transaction resulted in a loss.

b. The restitution order is illegal since the government failed to prove any loss.

"The restitution amount must be ascertained and delineated with an accurate computation, cannot exceed the loss actually caused and must be clearly set out with specific findings." *United States v. Boyle*, 10 F.3d 485 (7th Cir. 1993)[7]. The prosecution bears the burden of demonstrating the amount of loss and of proving the loss by a preponderance of the evidence. *United States v. Razo-Leora*, 961 F.2d 1140, 1146 (5th Cir. 1992). "Any dispute as to the proper amount . . . of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government . . . ." 18 U.S.C. § 3664(d).

Although the plea agreement provided that the Court might enter an order of restitution, this did not relieve the government of its burden of proving the amount of loss caused by Barron's criminal conduct.[8] *See United States v. Patty*, 992

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[7]A restitution order is invalid when the sentencing court fails to make factual findings with regard to the victim's actual loss. *See United States v. McAlpine*, 32 F.3d 484, 490-1, *cert. denied*, 115 S.Ct. 610 (1994). Specific factual findings are required when the defendant disputes the amount of restitution. *See, United States v. Gabriele*, 24 F.3d 68, 72 (10th Cir. 1994). In the instant case, it is particularly difficult to understand the district court's failure to make factual findings since the restitution amount was disputed and **the defendant made a specific request for findings of fact**.

[8]The Plea Agreement further provided that the restitution amount might be negotiated prior to sentencing. At sentencing, defense counsel noted that the FDIC had terminated negotiations in bad faith (See, Sentencing Transcript) and Barron's wife

F.2d 1045, 1051 (10th Cir. 1993) (where plea agreement provided for restitution in amount not to exceed 25 million, Government still must prove amount of loss attributable to criminal conduct). Here, the government did not present any evidence to support a finding of any loss.

Further, the lower courts have failed to address the issue that there was no loss because the "overfunded" loan amount was repaid. *See, United States v. Holley*, 23 F.3d 902, 915 (5th Cir. 1994) (failure to take into account property that has been returned renders the restitution order illegal).[9] As to the MVIC transaction, Victoria Savings and its successors in interest the RTC and FDIC, suffered no loss. *See, e.g. United States v. Jimenez*, 77 F.3d 95, 100 (5th Cir. 1996) (restitution is only appropriate for an actual loss). The government acknowledged at sentencing this note was repaid and the funds were put back into VSA [See Sentencing Transcript, p. 16.] The failure to consider this mandatory factor resulted in an illegal order of restitution.

c. The restitution order is illegal since it exceeds the amount of loss.

The government, while not presenting any evidence of loss at sentencing, has previously established the maximum amount of loss they were seeking from Barron at $70,010.00.

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deposited $95,000 in the registry of the Court representing all funds remotely associated with his activities at VSA. See Motion for Reduction of Sentence.

[9]18 U.S.C. § 3663(b)(1)(B) provides that restitution may be ordered in the amount of "the value of the property on the date of . . . loss, . . . less the value (as of the date the property is returned) of any part of the property that is returned.

Both the factual summary in support of Barron's Plea Agreement and testimony proffered by the government at the VSA Defendants' trial, established the government's intent to charge Barron with aiding and abetting in the misapplication of only $70,000.00. The criminal conduct outlined in the plea agreement described only one transaction, the misapplication of $70,010.00 on September 22, 1987. [See Supra p.7]. More importantly, the testimony the U.S. Attorney elicited from Barron established the government's intent to charge Barron with the misapplication of the "first seventy thousand of that two million . . ." [See Supra fn.3]. While no loss was proven at sentencing, the maximum amount that can be said to have been associated with Barron's conduct is $70,010.00.

2. Due Process Requirements of Restitution Order

A restitution order in excess of the amount of actual loss by the victim is a taking of property without due process of law in violation of the rights guaranteed by the Fifth Amendment of the United States Constitution. *Hughey v. United States*, 110 S.Ct. 1979, n.5 (1990) (citing H.R. Rep. No. 98-1017. p.83, n.43 (1984)). The enabling statute only authorizes restitution in the amount of an actual loss attributable to the count of conviction. Thus, an order exceeding this amount constitutes a taking of property without due process of law as prohibited by the constitution.

In the case of a restitution order, due process requires that 1) the government produce a preponderance of evidence with respect to the amount of loss attributable to the count of conviction; 2) the defendant have the opportunity to respond; and 3) the sentencing court make specific findings with respect to the disputed amounts. The restitution order in this case violated defendant's right to due process.

3. An illegal restitution order constitutes plain error

An improper order of restitution constitutes an illegal sentence and amounts to plain error that may be reviewed at any time. *See, United States v. Soto*, 47 F.3d 546, 549 (2nd Cir. 1995); *United States v. Coleman*, 9 F.3d 1480, 1486 n.4 (10th Cir. 1993) *cert. denied*, 115 S.Ct. 453 (1994). In the instant case, the Fifth Circuit failed to recognize that the trial court's discretion is not in issue when the legality of the sentence is challenged. See *United States v. Tooker*, 747 F.2d 975, 978 (5th Cir. 1984), *cert. denied*, 471 U.S. 102 (1985).[10]

In affirming the district court's denial of Barron's motion, the Fifth Circuit also failed to undertake a *de novo* review which is required when the legality of the restitution order is raised on appeal. *United States v. Hayes*, 32 F.3d 171, 172 (5th Cir. 1994); *United States v. Reese*, 998 F.2d 1275, 1280 (5th Cir. 1993). The restitution order in this case is clearly illegal and the Fifth Circuit failed to perform its duties in reviewing the decision of the district court.

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[10]The phrase "abuse of discretion" does not imply intentional wrongdoing or bad faith, or misconduct, nor is it any reflection on a district judge. *United States v. Walker*, 772 F.2d 1172, 1176 n.9 (5th Cir. 1985). A judge "abuses his discretion" when he fails to apply a proper legal standard, follow proper procedures in making a determination, or bases an award upon findings of fact that are clearly erroneous. *In Re: U.S. Golf Corp.*, 639 F.2d 1197, 1201 (5th Cir. 1981). In the instant case, the district court failed to apply the proper legal standard **and** failed to follow proper procedures **and** based an award without specific findings of facts.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that his application for writ of *certiorari* be granted by this court. Petitioner suggests that, under the facts of this case, a summary disposition of the case on the merits is appropriate and the case should be remanded to the Fifth Circuit with instructions to conduct a *de novo* review of the restitution order in accordance with *Hughey*.

Respectfully submitted,

HUGHES, WATTERS & ASKANASE, L.L.P.

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APPENDIX

A. Opinion of the United States Court of Appeals for the Fifth Circuit Affirming the Judgment of Conviction

B. Opinion of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50587
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD R. BARRON,

Defendant-Appellant.

- - - - - - - - - - - - - -

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-93-CR-267

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Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

PER CURIAM:*

Edward R. Barron appeals the district court's denial of his motion pursuant to former FED. R. CRIM. P. 35 for reduction of an

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

award of restitution. Barron has failed to show that the order of restitution was illegal or that the district court abused its discretion by denying his motion. United States v. Holley, 32 F.3d 902, 914 (5th Cir.), cert. denied, 115 S. Ct. 635 (1994) and 115 S. Ct. 737 (1995); United States v. Tooker, 747 F.2d 975, 978 (5th cir. 1984), cert. denied, 471 U.S. 1021 (1985). Barron has filed a motion to expedite his appeal which is DENIED AS MOOT.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50587

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

EDWARD R. BARRON,

Defendant - Appellant.

- - - - - - - - - - - - -

Appeal from the United States District Court for the
Western District of Texas, San Antonio

- - - - - - - - - - - - -

ON PETITION FOR REHEARING

(Filed June 2, 1996)

Before SMITH, BENAVIDES and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
United States Circuit Judge

REHG-2

CLERK'S NOTE
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.